79121-0
No. 32402-4-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROY LEN NEFF,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

On appeal from the Superior Court of Pierce County, the
Honorable Ronald E. Culpepper, Judge

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2. The trial court's supplemental finding that there was insufficient evidence for it to find that Deputy Fry had the required subjective intent for application of the emergency exception supports the trial court's previous conclusion that the exception did not apply.

3. The trial court erred in concluding that the officer would have sought a warrant absent the illegal search. Appellant assigns error to the trial court's Supplemental Finding of Fact 2, which provides:

> The court further finds that the responding deputies would have sought and would have been granted a search warrant without evidence seized from the initial search of the garage. Prior to said entry, Deputy Jones, a member of the meth lab team with experience in over 100 meth labs, had noticed an "extremely powerful" smell of anhydrous ammonia which he knew was used to manufacture methamphetamine. Jones was informed by Mr. Neff that the residence had previously been a meth lab. Jones observed a large number of blister packs in a burn pile and knew pseudoephedrine products were often packaged in blister packs. He observed a garden sprayer "misting" and recognized it as a homemade hydrochloric acid generator and knew that hydrochloric acid is used in the manufacture of methamphetamine. The defendant's wife told the deputies the defendant was manufacturing methamphetamine in the garage. Deputy Jones subjectively believed there was a "meth operation" on the premises prior to any entry into the garage, based on the facts observed by him and his prior training and experience.

CP 359.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS

1. The emergency exception to the warrant requirement does not apply unless the trial court finds both that the officer who conducted

the unlawful entry had a subjective belief that someone inside the place entered needed assistance for health or safety reasons, and that any such belief was objectively reasonable. In this case, prior to remand, the trial court found that the emergency exception did not apply to the warrantless entry of the garage, because there was no objective evidence or even the slightest indication that anyone was inside the garage or in need of assistance there. The trial court also rejected the officers' claims that there was a serious "danger" posed to the public nearby which compelled the entry, given that the same officers had kept children on the property while the "danger" was ongoing. On remand, the trial court further found that there was insufficient evidence for it to make any findings about the subjective intent or belief of the officer who entered the garage, because the officer did not testify at the suppression hearing.

Was the trial court's conclusion that the emergency exception did not apply supported by its finding that it could not conclude the officer had the required subjective intent? Further, because it is the prosecution's burden to prove that an exception to the warrant requirement existed, is the prosecution's failure to present evidence regarding the subjective intent of the entering officer fatal where that intent was a necessary part of the required proof?

2. Where a warrant is sought after an unlawful search, the prosecution must show that the search did not in any way contribute to the issuance of the warrant by showing, inter alia, that the officers would have sought the warrant even if they had not conducted the illegal search. On remand, the trial court found that officers would have sought and been

granted a search warrant prior to the illegal search of the garage.

Did the trial court err in making that finding where it relied on the defendant's wife's admissions that she "knew" her husband was manufacturing methamphetamine in the garage where those admissions were not made until after the officers had illegally entered the garage and Mrs. Neff knew they had found evidence of the manufacture?

Further, did the court err in making the finding where it considered only general facts which would have supported a decision to apply for or issue a warrant while ignoring facts which indicated that this specific officer would not have sought a warrant absent the illegal search?

C. SUPPLEMENTAL STATEMENT OF THE CASE[1]

Appellant Roy L. Neff was charged with and convicted of manufacturing methamphetamine and committing that crime while armed with a firearm after a stipulated facts trial, held once a motion to suppress was unsuccessful. CP 99-105; 7RP 236-37.

While the appeal was pending before this Court, on December 28, 2005, the Court ordered remand to the trial court for entry of findings on several disputed issues.

On January 6, 0206, the hearing on remand was held before the Honorable Ronald E. Culpepper.[2] RRP 1. Findings were entered that same date. CP 358-59.

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[1]Supplemental discussion of the relevant facts and the hearing are included in the argument section, *infra*.

[2]The verbatim report of proceedings for the remand hearing will be referred to as "RRP."

This supplemental pleading timely follows.

A. SUPPLEMENTAL ARGUMENT

1. THE COURT'S SUPPLEMENTAL FINDING SUPPORTS ITS PREVIOUS CONCLUSION THAT THE EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT APPLY

a. Relevant supplemental facts

At the suppression hearing, Detective Crawford and Deputy Jones testified about the dangers of anhydrous ammonia. Detective Crawford stated that it was an "irritant" if inhaled. 7RP 62. He also stated it could cause "burn hazards" if it came into contact with skin, and that a person could possibly become "overcome" by fumes if enough of it leaked in an enclosed area. 7RP 70. He admitted, however, that there was no fire, explosion or combustion risk from a release of anhydrous ammonia. 7RP 64, 70. He stated that other chemicals involved in methamphetamine manufacture are "flammable often" and "often associated with dangerous situations." 7RP 69. He also noted that, in general, there are "often" solvents which could be characterized as "explosive devices" involved in manufacturing of methamphetamine. 7RP 22. He stated that there were concerns when anhydrous ammonia was smelled "[b]ecause of the potential health risk to the people in the area." 7RP 75.

Deputy Jones testified that he had seen people shot at methamphetamine labs, had seen small children "contaminated" at some sites, and had seen suspects "injured" at some labs. 7RP 102-103. He stated that his concern with the anhydrous smell was that Mrs. Neff had "at least one small child with her." 7RP 92-93. He also cited the

"immediate health hazard" to neighbors, small children, and the Neffs. 7RP 123.

Both the detective and the deputy admitted there were possible legal uses of anhydrous, including as a fertilizer. 7RP 79-83, 125-26.

After hearing the evidence and weighing the credibility of the testimony, Judge Culpepper specifically found that the entry into the garage was not supported by "exigent circumstances," declaring that, "if this is exigent circumstances. . . the exception is swallowing the rule." 7RP 175-76. More specifically, the court found there was "no indication" that the smell the officers discerned had caused or threatened "any particular problem to the people present," and that there was "no objective evidence that someone was in the garage" or any "particular reason" to think they were. 7RP 175-78; CP 328. The court noted there was also no evidence of any "sounds" coming from or around the garage, and nothing to suggest anyone was inside. CP 324-25.

Regarding the claims of "danger," the court rejected those claims, noting the officers had admitted there was not really a "major threat" of something such as fire or explosion in this case. 7RP 167, 178. The court also pointedly noted that the same officer who cited the potential of a leaking tank as such a safety and health risk that it justified the intrusion into the garage had not acted in a way showing he truly thought there was "too great a threat," because he had specifically kept small children nearby. 7RP 178. The court stated, if the officer was "worried about this odor being a threat to their health, why didn't he let them leave?" 7RP 167.

In its Order of remand, this Court directed the trial court to "clarify" its findings about the subjective intent of Deputy Fry when he entered the garage. Order at 2. The Court referred to the "emergency exception" to the warrant requirement, noting that the exception allows officers to enter a place if they reasonably, subjectively believe someone "likely needed assistance for health or safety reasons," and ordered the trial court to make a finding whether Deputy Fry had a subjective belief "that there was an emergency requiring immediate entry" when he went into the garage. Order at 2.

In its response brief, the prosecution did not assign error to any of the trial court's findings. Brief of Respondent (hereinafter "BOR") at 1-27.

On remand, Judge Culpepper indicated that he had drafted a finding that the deputy "did not have a subjective belief that someone likely needing assistance was located in the Neff garage." RRP 8. The prosecutor then objected to any findings about the deputy's belief, based on the fact that the deputy had not testified. RRP 9. After some discussion, the court entered a written finding that "Deputy Fry did not testify at the hearing, so the court cannot find what his subjective belief was at the time of entry into the garage." CP 358.

b. The court's finding on remand further supports its conclusion that the emergency exception to the warrant requirement did not apply

After hearing all the evidence and weighing the credibility at the suppression hearing, the trial court found that there was no "emergency" which justified application of the "emergency exception" to the warrant

requirement in this case. The trial court's finding on remand that it could not find that the officer had the required subjective belief to support application of that exception further supports the court's initial conclusion.

Warrantless searches are per se unreasonable. State v. Poling, 128 Wn. App. 659, 666, 116 P.3d 1054 (2005). One of the few jealously guarded and narrowly drawn exceptions to the warrant requirement is the "emergency" exception. See State v. Schroeder, 109 Wn. App. 30, 38, 32 P.3d 1022 (2001). That exception applies and justifies a warrantless entry into a place only when:

> (1) the officer subjectively believes that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for such assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.

State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). Further, for the exception to apply, the police actions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Schroeder, 109 Wn. App. at 37, quoting, Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

Here, the trial court properly found that the emergency exception did not apply. Even prior to the finding entered on remand, the court specifically entered findings which precluded application of that exception. The court explicitly found 1) there were no sounds coming from the place searched (the garage) which could have indicated anyone was there, 2) there were no reports of anyone "in or around the garage that would suggest there was anybody" in the garage, 3) there was no

"objective evidence there was a person in the garage," and 4) there was no reason whatsoever to believe anyone was in danger of illness due to the odor coming from the garage. CP 325-27. The court also implicitly found the "threat to safety" claim of the officers was not reasonable, given that the officers had actually ensured that children were kept right next to that "threat." 7RP 178. This finding is not surprising, given that all of the testimony regarding the "danger" was based upon assumptions about other dangerous chemicals or guns or the like found at some other sites where manufacturing occurred, not based on facts indicating an inherent, immediate danger posed by a leak of anhydrous ammonia.

Further, although the court did not focus on them, other facts and the deputy's behavior also belied his claims and the suggestion that things were so dangerous that there was an "emergency" which was so immediate that getting a warrant would have been a problem. Deputy Jones walked around the property, without protective gear, with civilians, for an hour and a half before calling for a "lab team"- not a "haz mat" team. He did not cordon off the area and remove the civilians to safety. He did not allow the children to leave. He did not don safety gear himself. He did not prevent Mr. Neff and Mr. Rowlands from walking around with him.

The trial court's findings that there was no objective evidence to support any possible belief anyone was in the garage in danger, and that there was, in fact, no emergency, were amply supported by substantial evidence. See 7RP 70-73,76-77,105, 118-19; (admissions of officers that they never heard or saw anything indicating there was anyone inside the locked garage or that anyone had been there at all that day); 7RP 11, 62,

64, 70, 72, 75, 92-93, 123 (testimony of officers regarding general danger of methamphetamine labs coupled with testimony admitting keeping women, children and other civilians on the property).

In any event, the prosecution did not assign error to any of the trial court's findings, so they are verities on appeal. State v. Hill, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994); see BOR at 1-27.

Thus, even prior to its finding on the subjective belief of Deputy Fry, the trial court had already found that there was no objective evidence to support any belief someone was in the garage or needed assistance there, or that there was any "threat to safety." The "emergency exception" already could not apply, because the court had already found facts, supported by substantial evidence in the record, that a reasonable person in the same situation would *not* have believed someone was inside, in need of assistance, or that there was any real threat of danger from the smell. See Thompson, 151 Wn.2d at 802.

With the supplemental finding, the trial court foreclosed any remaining possibility that the emergency exception could have applied. The trial court's specific finding - made at the *prosecutor's* urging - was that, because Deputy Fry did not testify at the hearing, the court could not find what his subjective belief was at the time of the entry into the garage. CP 358; RRP 9.

Thus, the emergency exception to the warrant requirement could not apply. It is the *prosecution's* burden to provide the evidence to support an exception to the general prohibition against warrantless entry. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). By failing to

present the deputy's testimony to prove that he had the required subjective belief, the prosecution failed in its burden to prove that the emergency exception applied. The trial court's initial conclusion that the exception did not apply, supported by substantial evidence and the law, is even further supported by the supplemental finding and easily withstands review.

2. THE TRIAL COURT ERRED IN FINDING THAT THE OFFICERS WOULD HAVE SOUGHT A SEARCH WARRANT WITHOUT THE ILLEGALLY OBTAINED EVIDENCE

a. Relevant supplemental facts

At the suppression hearing, Deputy Jones testified that, after he saw the burn pile and misting sprayer and Deputy Johnson had arrived and prevented Mr. Neff from leaving, Deputy Jones called for a "lab team responder" to come to the property. 7RP 104. Deputy Jones had not yet found the source of the smell when that "responder," Deputy Fry arrived, used Mr. Neff's keys and entered the garage. 7RP 104-106.

Detective John Crawford, the officer who applied for the search warrant, was not called to the property by Deputy Jones. 7RP 38-40, 116-17. Instead, he was contacted by Deputy Fry. 7RP 38-40. The detective testified that the deputy called him to the property "for the purpose of investigating and applying for a search warrant." 7RP 38-40.

When Detective Crawford arrived, the garage was no longer locked. 7RP 61. The deputies told the detective that they had entered the locked garage to "locate the source of the ammonia," which they could not identify as coming from the garage specifically, but just from the general

vicinity. 7RP 62-63.

Deputy Jones testified that he was had a "limited amount" of awareness of telephonic search warrants, although he admitted knowing how to fill the forms out in general. 7RP 119. He said he would not have attempted to get a search warrant that day because he had never done one, and would feel uncomfortable doing it. 7RP 119. He testified that he was not sure he would have done it right, and that was the reason he had asked for a detective to come do it. 7RP 119.

Detective Crawford admitted that Deputies Jones and Fry had ample time to get a telephonic search warrant prior to entering the garage, and that it is common practice to get such warrants. 7RP 78.

Deputy Jones testified, that, after Deputy Fry had entered the garage, Child Protective Services was called regarding the children. 7RP 105-107. When CPS arrived and contacted Mrs. Neff, she was allowed to contact her parents, who were permitted to take the children after they came to the property and spoke with the CPS worker there. 7RP 107-108. Mrs. Neff was also told that a detective was "coming out to the scene" and would probably want to talk to her. 7RP 108-109. That detective was Detective Crawford, whom Deputy Fry had by then called. 7RP 38-40, 108-110.

Prior to the interrogation of Mrs. Neff by Detective Crawford, Deputy Jones spoke with Mrs. Neff about the items the deputies had discovered on the property. 7RP 118. Deputy Jones did not recall if he spoke with Mrs. Neff about those things just after the items were located, while they waited for Detective Crawford to arrive, or after the detective

had arrived. 7RP 118. The detective did not interrogate Mrs. Neff until about a half hour after he arrived, after he had spoken with the deputies about what they had uncovered and had gone to look at the items himself. 7RP 40-43, 69.

The affidavit for the warrant indicated that Mrs. Neff told Detective Crawford that she and her husband used methamphetamine and her husband had said he was going to start making the drug to make money. CP 53-56. She told the detective that Mr. Neff had built the garage and would not let her have a key or access, and she saw him several times in the doorway to the garage holding a tube inside a glass jar and stirring it. CP 53-55. Mrs. Neff stated she "knew" Mr. Neff was manufacturing methamphetamine in the garage. CP 53-55.

After the testimony was concluded, Mr. Neff argued, inter alia, that the evidence seized under the warrant was not sufficiently independent of the illegal search, because the officers "probably wouldn't have proceeded with the search warrant had they not gone into the garage." 7RP 192. The court then asked, "how do we know that?" 7RP 192. Counsel agreed that the prosecution had presented "no information" on that issue. 7RP 192. He noted, however, that the officers were there for more than an hour and a half prior to entering the garage and made no efforts whatsoever to get a warrant during that entire time or before the entry. 7RP 192-93. Despite counsel's argument, at that time, the trial court made no finding on whether the officers would have sought the warrant if they had not seen the items in the garage.

Also during argument, when the prosecution noted that Mrs. Neff

had made statements that she thought her husband was manufacturing methamphetamine in the garage and that information was in the warrant, the trial court reminded the prosecutor that those statements were only made "after the entry into the garage." 7RP 163. The court also noted that by that time Mr. Neff had been "quote, detained, unquote, by the officers" and "Mrs. Neff knew what was going on there." 7RP 163. The court questioned whether Mrs. Neff would have made the statement "without the entry into the garage." 7RP 163. Later, the court indicated it was "having some difficulty saying whether Mrs. Neff's statement should be suppressed" given the circumstances, but found it significant that Detective Crawford did not make "much mention of what was found in the garage" in the taped interview with Mrs. Neff. 7RP 181-82.

At the remand hearing, the trial court suggested the possibility that the officers "may have" been worried that "maybe" someone was inside the garage and would get more ill as time passed, and that could be why they had waited on the warrant. RRP 13. The court again stated, however, that there was not "objectively enough proof" anyone was inside the garage, and that the officers should have gotten the warrant prior to the entry. RRP 11-13.

Nevertheless, the court stated it was a "no brainer" that the officers would have gotten the warrant, based primarily on the strength of the smell and the evidence found on the property. RRP 11. After a brief break, and over defense objections, the court adopted further language the prosecutor had proposed off the record, that the fact that the defendant's wife had told deputies he was manufacturing methamphetamine in the garage was

another fact supporting the finding that the officers would have sought a warrant without the illegal search. RRP 17.

b. The court erred in concluding that the officers would have sought the warrant if they had not found the evidence in the illegal search

When police engage in an unlawful search, they cannot simply later get a warrant to "cure" that illegal conduct. See Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988); State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005); People v. Burr, 70 N.Y. 2d 354, 362, 520 N.Y.S. 2d 739, 514 N.E. 2d 1363 (1987), cert. denied sub nom Burr v. New York, 485 U.S. 949 (1988). Instead, the evidence seized as a result of the warrant will be suppressed unless the prosecution can meet the "onerous" burden of proving that the evidence was "later obtained independently from activities untainted by the initial illegality." Murray, 487 U.S. at 537, 540. Put simply, the ultimate question is "whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue." Murray, 487 U.S. at 542. If not, the evidence must be suppressed, in order to prevent the police from benefitting from violating the constitution. Id.

The inquiry under Murray is twofold. State v. Spring, 128 Wn. App. 398, 403, 115 P.3d 1052 (2005). To prove that the unlawful search did not taint the subsequent search conducted pursuant to a warrant, the prosecution must show 1) that the information illegally obtained did not affect the magistrate's decision to issue the warrant and 2) that "the agents' decision to seek the warrant was [not] prompted by what they had seen during the initial entry[.]" Murray, 487 U.S. at 542.

Here, the trial court found that the officers would have sought and obtained a warrant even if they had not discovered the evidence of methamphetamine manufacture and other items in the illegal search of the garage. But the trial court's finding is erroneous, in several ways.

First, the trial court's focus was wrong. The trial court was concerned with whether there were sufficient facts which *could* have supported the decision to seek a search warrant and *would* have supported a magistrate's decision to issue a warrant. RRP 1-17. But the issue is not whether, objectively, such facts existed. The issue is the subjective *motivation* of these particular officers when they actually sought the warrant upon which the state now relies. See Connor v. Tilton, 948 F. Supp. 821, 858 (N.D. Iowa 1996), affirmed, 127 F.3d 663 (1997).[3] The point is to ensure that what was found in the illegal search did not in fact play any part of the decision to get the warrant, so that the warrant can truly be deemed an "independent source" for the evidence. See Murray, 487 U.S. at 537, 540.

Thus, the question is not whether any officer could have requested and gotten a warrant, as the trial court here seemed to surmise. The question is what were *these* officers' reasons for seeking the warrant and were those reasons completely independent of what was found in the illegal search. Id. In other words, would these particular officers have bothered getting a warrant if they had come up with nothing on their initial

[3]Objective analysis comes into play when an officer assures the court that a warrant would have been sought and the court is required to examine the totality of the circumstances to determine if those assurances are "implausible." Murray, 487 U.S. at 540 n. 2.

illegal entry? See United States v. Dessesaure, 429 F.3d 359, 369 (1st. Cir. 2005).

Further, in making its decision, the court must not simply consider whether the untainted evidence known to police would have supported getting a warrant but also "the 'relative probative import' of information secured during the illegal search 'compared to all other information known to the officers.'" See People v. Del Rio, 220 A.D.2d 122, 131, 646 N.Y.S.2d 117, appeal denied, 88 N.Y.2d 983, 649 N.Y.S.2d 390 (1996), quoting, United States v. Restrepo, 966 F.2d 964, 972 (5th Cir. 1992), cert. denied sub nom, Pulido v. United States, 506 U.S. 1049 (1993).

Here, the trial court did not focus on the subjective motivation of the officers - essentially Deputy Jones - in ultimately seeking the search warrant. Nor did the court examine the relative probative import of the evidence found during the illegal search, in order to determine whether that evidence was, in fact, the motivating factor for seeking the warrant. Instead, the court simply cited facts which would have supported getting a warrant, while ignoring crucial, relevant facts indicating that *this* officer would not, in fact, have sought one, had the illegal search not occurred.

Where, as here, there is no direct evidence (i.e. testimony) from an officer that he would have sought a warrant even without the evidence the unlawful search turned up, a court can only "infer motivation from the totality of facts and circumstances." See Restrepo, 966 F.2d at 971. But here, the trial court did not consider very crucial, relevant facts which were part of the "totality" and which indicated that, in fact, the deputy would *not* have gotten a warrant absent the illegal search.

For example, the trial court failed to consider that Deputy Jones never said that he would have sought a search warrant absent the illegal entry. While an officer's claim on that point would not be dispositive, its absence is certainly noteworthy and relevant. See Murray, 487 U.S. at 540 n. 2.

Other facts not considered by the trial court are equally relevant, as follows: Deputy Jones admitted that, despite his experience with more than 100 "meth" labs, he had never gotten a telephonic warrant, was not sure he could do so properly, and thus would not have tried. There was *no* discussion of getting a warrant, either between Deputy Jones and his partner or between Deputy Jones and Deputy Fry, prior to the entry into the garage. No steps were taken to get one and no detective was called to begin the process until after Deputy Fry had gone into the locked garage and seen the contraband. Compare, United States v. Salas, 879 F.2d 530 (9th Cir.), cert. denied, 493 U.S. 979 (1989) (officers discussed getting a warrant prior to the illegal entry and were planning to do so but entered out of concern for destruction of evidence during the 3 hours the warrant process would take).

Further, although the trial court thought that the "smell" indicated that the deputy would have gotten a warrant, Deputy Jones was at the property smelling the smell for approximately an hour and a half and made no effort to get a warrant. And Deputy Crawford admitted that both Deputy Jones and Deputy Fry had ample time within which to get a telephonic warrant, prior to the entry and that it was accepted practice.

Thus, there were no efforts made to even begin the process of

getting a warrant, prior to the illegal search. The deputy who would have sought the warrant did not do so for more than an hour and a half, and testified that he *would not* have done so, even though he had ample time and doing so was a routine, accepted practice. His actions clearly indicate that he had no intention of getting a warrant but was just investigating with the intent of seeing what he could find.

The court also did not consider the fact that, when Deputy Jones finally called for assistance, after seeing the "misting" sprayer between the shed and the garage, he *did not* call for a detective to come begin the process of getting a warrant. Instead, he called a "lab team responder" to come conduct a search. Thus, even after the deputy had seen the evidence the trial court said would have prompted him to get a warrant, again, he made no effort to do so. And there were no other additional facts found after the search which might have compelled the officer to get a warrant - simply those gained by the illegal search (including Mrs. Neff's statements, as discussed *infra*).

Also relevant is that Detective Crawford was not called to the property until after the illegal entry. When he was called it was for the purposes of getting the warrant. And when he arrived, and spoke with the deputies, they told him they went inside the garage to *see if it was the source of the smell*, not because they identified it specifically as the source.

All of these facts were highly relevant to whether Deputy Jones would have actually sought a warrant if the illegal search had not occurred. All of them went directly to the question of whether the warrant ultimately sought by Detective Crawford was actually an independent source for the

evidence or was tainted, because the motivation for getting it included the evidence illegally found. Yet the trial court failed to consider any of these facts, instead focusing on general facts about whether a decision to request a warrant would have been proper if the evidence found in the garage had not been found.

Thus, the trial court used an improper focus and failed to consider all of the relevant facts before making the finding. In addition, the finding relied on a fact which does not support it. That fact, advanced by the prosecution, was that Mrs. Neff "told the deputies that the defendant was manufacturing methamphetamine in the garage." RRP 16-17; CP 53-55.

It is correct that Mrs. Neff made statements about her belief that her husband was manufacturing methamphetamine in the garage he would not let her enter. See CP 53-55. There are several problems, however, with the court's reliance on those statements as supporting the finding that the deputies would have sought the warrant even if the illegal search had not occurred. All of these problems raise the very real question of whether those statements would even have been made absent that search.

First, the timing of the statements is crucial. Mrs. Neff did not make them statements until after the officers had illegally entered the garage. The court itself noted a serious question about whether Mrs. Neff would have made those statements if the initial, unlawful search had not occurred. 7RP 163. Thus, at the time the statements were made, the "cat" was already "out of the bag," because of the illegal search. See, e.g., State v. Byers, 88 Wn.2d 1, 9, 559 P.2d 1334 (1977), overruled in part on other grounds by, State v. Williams, 102 Wn.2d 733, 741 n. 5, 689 P.2d 1065

(1984) (statements made after watching officers seize evidence were the product of the declarants' belief that "they were had" already, as the police already had the evidence).

Second, although the trial court found it significant at the initial suppression hearing that Detective Crawford had not been confrontational about the items found in the garage during the interview, that "fact" is deceptive. The detective was not the only officer who spoke to Mrs. Neff. Deputy Jones also spoke to Mrs. Neff and admitted discussing with her the items which had been found, either right after they were found, while the officers were waiting for the detective to arrive, or just after his arrival. 7RP 118.

Third, prior to Mrs. Neff's statements, the deputy had told Mrs. Neff that CPS had been called for the children's safety, because the methamphetamine lab had been found. And Mrs. Neff had been prevented from leaving the property, as had her husband, who was in custody in the back of a police car at the time her statements were made.

Thus, Mrs. Neff's admissions to the detective were made only after 1) she was aware that the officers had already found the methamphetamine lab with the illegal entry, 2) she had been told her children were going to be taken away by CPS because of that lab, 3) she was not allowed to leave the property and her husband was detained, and 4) at least one police officer "discussed" what had been found with her.

Notably, Mrs. Neff had already talked to police several times prior to the interrogation and had never once said anything about a lab, even though Deputy Jones had repeatedly mentioned the anhydrous smell he

was investigating. 7RP 90-91, 93, 97-98. And Deputy Jones had specifically told Mrs. Neff she could not leave with the children because they needed to stay "until we locate this," the source of the smell, but Mrs. Neff had still not said anything about a meth lab in the garage. 7RP 97-98.

Based upon this record, it is patently obvious that Mrs. Neff would not have made the admissions had the police not conducted the illegal search. To rely on those admissions as supporting the finding that the officers would have sought a warrant even absent the illegal search is to ignore the circumstances under which the admissions were made and the fact that they would not have been made had the illegal search not occurred. Mrs. Neff's admissions would not have been available as a motivating factor for getting a warrant, absent the illegal search, and the trial court erred in relying on those admissions as supporting the finding.

The point of Murray is to ensure that the police do not in any way benefit from illegal conduct. It is to deter "confirmatory searches," where police search in order to see what they can find and to confirm that there is evidence worth the trouble of obtaining a warrant. See United States v. Pena, 924 F. Supp. 1239, 1256 (D.Mass. 1996). The reason behind requiring that the officer would have sought the warrant had the illegal search not occurred and the evidence not seen is to ensure that the illegal search played absolutely no part in the decision to get the warrant. See United States v. Hill, 55 F.3d 479, 481 (9th Cir. 1995). Only by ensuring that the officer's decision to seek a warrant is one that he would have made anyway can it be ensured that the "later, lawful seizure" under that warrant is "genuinely independent" of the illegal conduct and thus not

"tainted." Murray, 487 U.S. at 541. The trial court erred in its analysis, failure to examine all of the crucial facts, and reliance on an erroneous fact in making its finding. The illegally viewed evidence clearly had the most relative probative import of all of the information known when the warrant was sought, and it was clearly the largest motivating factor for getting the warrant. The trial court erred in finding that the officers would have sought the warrant even if the illegal search had occurred, and this Court should so hold and should reverse.

E. CONCLUSION

The prosecution failed to present sufficient evidence for the trial court to make a finding about Deputy Fry's subjective intent or belief when he entered the garage. The trial court's finding on remand to that effect precludes application of the "emergency exception" to the warrant requirement, as do the trial court's other undisputed findings, which are verities on appeal.

Further, the trial court's finding that Deputy Jones would have sought a warrant even if Deputy Fry had not entered the garage illegally does not withstand review. The court erred in its focus, ignored relevant, vital facts, and relied on a fact which does not support the finding. The totality of the circumstances here does not support a finding that the deputy would have sought the warrant, and, under Murray, the evidence should have been suppressed. This Court should so hold and should reverse. It should also reverse based upon the other arguments presented in Mr. Neff's opening brief.

DATED this 7th day of February, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAILING

I certify under penalty of perjury under the laws of the state of Washington that I mailed a true and correct copy of the above Motion to opposing counsel and appellant as follows: to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; Mr. Roy L. Neff, DOC 780428, MICC, P.O. Box 1000, Steilacoom, WA. 98388-1000.

DATED this 7th day of February, 2006.

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